IN THE

Supreme Court of the United States

NUMBER 75-1574

JOHN G. DeFRANCIS, Jr. PETITIONER

VERSUS

THE CITY OF BOSSIER CITY RESPONDENT

Petition for Writ of Certiorari

to the Supreme Court of Louisiana

KELLY AND WARE
P. O. BOX 756
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AND

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THE CITY OF BOSSIER CITY RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

The petition of John G. DeFrancis, Jr., prays that a writ of certiorari issue to review the judgment of the Court of Appeal, Second Circuit, State of Louisiana, rendered November 6, 1975 in the above entitled cause in which the Louisiana Supreme Court denied writs on January 30, 1976.

OPINION BELOW

The opinion of the Louisiana Court of Appeal for the Second Circuit is appended to the petition in compliance with Rule 23 (i) of the Supreme Court Rules. The denial of Certiorari by the Louisiana Supreme Court is also appended to the petition.

JURISDICTION

The judgment of the Supreme Court of Louisiana denying Certiorari was entered on January 30, 1976. The jurisdiction of this Court is involved pursuant to 28 U.S.C. 1257 (2) (3), and 28 U.S.C. 2101.

QUESTIONS PRESENTED

1. Whether the decision of the Louisiana Court of Appeals for the Second Circuit, and the subsequent denial of Certiorari by the Louisiana Supreme Court deprived petitioner of his rights under the first paragraph of the 14th Amendment of the United States Constitution regarding equal protection of laws and the guarantee of due process of law.

2. Whether or not the City Ordinance device relied on by the City of Bossier, Louisiana, to regulate "B-drinking"

activities is in conflict with United States Constitutional provisions.

3. Whether or not an alleged violation regarding one liquor permit allows suspension of another permit under the 14th Amendment guarantee of due process of law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the 14th Amendment to the Constitution of the United States. The case also involves the following statutes, laws and court rules.

Bossier City Code, "Sections 5 - 7":

> "No person holding a retail dealer's permit under this chapter and no alcoholic beverage handling employee shall do or permit to be done any of the following acts on or about the premises covered by such permit . . . . . .
>
> (7) Employ or permit females, commonly known as "B Girls" to frequent the premises and solicit patrons for drinks, or to accept drinks from patrons and receive therefor any commission or remuneration in any other way."

Louisiana Revised Statute 26:88 (7):

> "No person holding a retail dealer's permit and no agent, associate, employee, representative, or servant of any such person shall do or permit any of the following acts to be done on or about the licensed premises:
>
> (7) Employ or permit females, commonly known as 'B Girls' to solicit patrons for drinks and to accept drinks from patrons and receive therefor any commission or any remuneration in any other way."

Louisiana Revised Statute 26:79 (6) (7) (8):

> "Applicants for state and local permits of all kinds shall meet the following qualifications and conditions:
>
> (6) Has not had a license or permit to sell or deal in alcoholic beverages, issued by the United States, any state, or by any political subdivision of a state authorized to issue permits or licenses, revoked within one year prior to the application, or been convicted or had a judgment of court rendered against him involving alcoholic beverages by this or any other state or by the United States for one year prior to the application.
>
> (7) Has not been adjudged by the board or convicted by a court of violating any of the provisions of this Chapter.
>
> (8) Has not been convicted of violating any municipal or parish ordinances adopted pursuant to the provisions of this Chapter. If the applicant has been so convicted, the granting of a permit or of a renewal is within the discretion of the board.

Louisiana Revised Statute 26:285:

> "No person holding a retail dealer's permit and no servant, agent, or employee of the permittee shall do any of the following acts upon the licensed premises:
>
> (1) Sell or serve beverages of low alcoholic content to any person under the age of eighteen years.
>
> (2) Sell or serve beverages of low alcoholic content to any intoxicated person.
>
> (3) Intentionally entice, aid, or permit any person under the age of seventeen years to visit any place where alcoholic beverages are the principal commodity sold or given away.
>
> (4) Permit any prostitute to frequent the licensed premises.
>
> (5) Permit any disturbance of the peace or obscenity, or any lewd, immoral, or improper entertainment, conduct, or practices on the licensed premises.
>
> (6) Sell, offer for sale, possess, or permit the consumption on the licensed premises of any kind or type of alcoholic beverages, the sale or possession of which is not authorized under his permit.

(7) Intentionally conduct illegal gambling, as defined by law, on the premises described in the application for the permit.
(8) Employ or permit females, commonly known as 'B Girls', to frequent the premises and solicit patrons for drinks or to accept drinks from patrons and receive therefor any commission or any remuneration in any other way.
(9) Employ anyone under eighteen years of age when the sale of alcoholic beverages constitutes the main business. If alcoholic beverages do not constitute the main business, an employee under eighteen years of age shall not handle or work with alcoholic beverages.
(10) Repealed. Acts 1956, No. 123, #4.
(11) Permit the playing of pool or billiards by any person under eighteen years of age, or permit such a person to frequent the licensed premises operating a pool or billiard hall.
Violation of this Section is punishable as provided in R.S. 26:521 and is also sufficient cause for the suspension or revocation of a permit.
Amended by Acts 1956, No. 123, #4."

STATEMENT OF THE CASE

This case originated before the City of Bossier Council concerning the suspension and/or revocation of petitioner's city retail liquor permits.

Petitioner is the holder of two (2) City Retail Liquor Permits for the year 1974, listed as follows:

A. Permit No. 2696 - Fountain Lounge, Inc.
B. Permit No. 2697 - Black Knight Lounge, Inc.

On or about December 17, 1974, petitioner received from the City of Bossier City, through the office of the Mayor, four (4) letters of the same date notifying him that there would be hearings held on December 30, 1974, ordering him to show

cause why the alcoholic beverage permits referred to hereinabove should not be revoked and/or suspended.

The City Council for the City of Bossier City voted to suspend said liquor permits relating to John G. DeFrancis, Jr., D/B/A Black Knight Lounge, Inc. and Fountain Lounge, Inc., for a period of thirty (30) days because of alleged "B-drinking" violations.

An appeal de novo was lodged in the Twenty-Sixth Judicial District Court for the Parish of Bossier, Louisiana, regarding the actions taken by the City Council referred to hereinabove, and at the same time and specifically on December 31, 1974, the Honorable Monty M. Wyche, Jr., issued a stay and restraining order directed to the City of Bossier City, staying, restraining and enjoining and prohibiting the said City of Bossier City from enforcing the suspension of petitioner's liquor permits as set forth hereinabove.

The case was duly tried de novo on January 10, 1975, and for written reasons the action of the City Council was affirmed and judgment entered to that effect on February 11, 1975. From this judgment a devolutive appeal was taken to the Second Circuit Court of Appeal. On February 21, 1975, a stay order issued from the Honorable Supreme Court of Louisiana suspending any proceedings with regard to the suspension of petitioner's liquor permits until the finality of the appeal in the Second Circuit Court of Appeal. From an adverse judgment from the Second Circuit Court of Appeal affirming the judgment of the trial Judge, petitioner applied for a writ of certiorari to the Louisiana State Supreme Court which was denied on January 30, 1976.

REASONS FOR GRANTING THE WRIT

The opinion of the Louisiana Second Circuit Court of Appeals as affirmed by the Louisiana State Supreme Court acted as a denial of due process and equal protection of the law.

This case presents squarely the question of whether or not the Bossier City Ordinance in question is constitutional. The Bossier City Ordinance prohibiting the solicitation by

female employees of "drinks" from patrons has virtually criminalized such conduct. Counsel for petitioner John G. DeFrancis, Jr., does not attempt to take a "tongue in cheek" approach argument against the right of the State of Louisiana or a municipal subdivision thereof to regulate various business activities under its police power and welfare authority. However, it goes without saying that such regulation must be tempered with reason and there is a vast difference between reasonable regulation for public health and safety and blanket control on the other hand. The provision and Section of the ordinances of the City of Bossier City, Louisiana, and the pertinent part thereof reads as follows, to-wit:

> "Section 5-7 - Prohibited Acts on Retail Sales Premises Generally
>
> No person holding a retail dealer's permit under this chapter and no alcoholic beverage handling employee shall do or permit to be done any of the following acts on or about the premises covered by such permit . . . . .
>
> (7) Employ or permit females, commonly known as 'B Girls' to frequent the premises and solicit patrons for drinks, or to accept drinks from patrons and receive therefor any commission or remuneration in any other way."

The Ordinance obviously denies equal protection to the female sex. The Ordinance clearly discriminates against females. As written, the Ordinance does not apply to males who might be employed on the premises as an alcoholic beverage handling employee. In short, there seems to be the implication from the tenor of the Ordinance that there is somethink more lewd about a female asking for a drink than a male asking someone for a drink. As a matter of fact, it goes further and narrows down the prohibition to include those females who are "commonly known as B Girls". Commonly known by the employer? Commonly known by the patron? Or commonly known by the common public? It is an elementary principal of

constitutional law that governing authorities, local officials and subdivisions of the state may regulate particular industries and businesses no more than is necessary to protect public health and morals. This basis is codified in La. Revised Statute 26:454. Granted, the statutes and jurisprudence in our history have generally allowed more plenary authority when an attempt is made to regulate the dispensing of alcoholic beverages. However, as stated above, such regulation must be reasonable and there should be and must be a showing of a rational connection between the regulation sought and the protection of public health and morals.

In the case of Frontiero v. Richardson, 93 S. Ct. 1764 (1973), the Court admonished that any classification based upon sex, race, or national origin must be suspect as a violation of the equal protection clause. The test is whether the government can show a compelling interest for the distinction and this shall be subject to strict judicial scrutiny. Now, what compelling interest has the City of Bossier shown for the discriminatory ordinance?

What harm is there to public health or "morality" for a female employee to sit down with a male customer and accept a "drink" from him? The judiciary of our great nation should not be so removed from human nature but to realize that males who frequent such premises do not only drink but enjoy social conversation and companionship of females. It should also be recognized that the laws protect those who cannot protect themselves; supposedly, such as minors. Yet what mature male needs legislative protection from the so-called "weaker sex". What great moral or health injustice is accomplished by a drink accepted by a female employee of a male customer, or for that matter, a female customer, for the Ordinance makes no distinction in the sex of the patron. There is no health hazard save that of the hazard of drinking alcohol. Now, apparently, the courts of this great nation, have determined that drinking per se is not unhealthy or immoral and if this be the case then it is so regardless of the place, people and circumstances surrounding it.

On the other hand, why doesn't the Ordinance apply to male solicitors, female impersonators or homosexuals. A much greater argument could be made for morals and health maintenance in this particular area.

It seems to boil down to the question of whose health and whose morals the regulation in question is attempting to protect. It is not protecting the health nor morals of the female requesting the drink unless she is under some incapacity or is perhaps underage. Is it attempting to protect the morals of the public in general who are not even on the premises and who thus are not in jeopardy of conduct detrimental to their health or morals? The answer to the above questions must be in the negative. The remaining participant must be the patron who, for the purposes of argument, must be assumed to be a male patron. Is his health in jeopardy by a request for a drink? Absolutely not! The remaining question obviously is whether or not his morals are in jeopardy or grave danger as a result of such a request. Extreme doubt exists here also. It would appear naive to say that the existing moral condition becomes seriously jeopardized and degraded by a request of a female for a drink, which request can be accepted or refused on the part of the male counterpart with a minimum of discretion. Are we now talking about protecting the male patron from himself and from his own existing morals? Perhaps so. As is obvious, the heretofore proposed questions have gotten extremely complex and perhaps approach the point of being ridiculous. Perhaps that is where we really are when we attempt to justify such stringent regulatory provision under the guise of protecting public health and morals.

By no means of the imagination does the petitioner, through his counsel, intend to present a sarcastic and satirical argument to this Honorable Court. To the contrary, petitioner, through his counsel, is attempting to present a "down to earth" and "logical" analysis of the Ordinance in question and to attempt to point out and highlight to this Honorable Court the fact that the Statute is excessively broad in its scope and nature and does not truly protect the public from the ill health and

immorality commonly sought to be controlled by state or city regulations.

In fact, the Ordinance seeks to punish as a crime conduct inherently peaceful and bearing no rational relationship to any valid legislative purpose and, accordingly, should be generally declared unconstitutional. The Ordinance makes criminal only the conduct of a female. Her male counterpart is guilty of no alleged criminal conduct. Under the Ordinance as written, a male could enter the premises, or a female for that purpose, order two drinks, invite a female employee to drink one of the drinks with him, and if she is receiving regular hourly wage she would then be deemed guilty of criminal conduct. Her counterpart would have started the encounter. He would have been the solicitor, and yet, the female employee alone would be guilty of the criminal activity. In this particular case, it could be said that it "takes two to tango". Petitioner fully realizes that there are many things in the daily lives of each of us which are offensive to our fellow citizens, but these many things certainly do not rise to the standard of warranting or requiring the intervention of government protection. Simply, one can walk away.

In applying the principles of logic to this case we are met with a horrifying conclusion: Since the sale of alcohol is generally not criminal, the possession of money is not criminal, and the sale of alcohol and the spending of money is perfectly acceptable except under this one given circumstance as set forth in this Ordinance, then we must naturally assume that the law is irrational. The Ordinance is discriminatory not only on the basis of the female alone being condemned, but also on the basis of the single type of transaction that it seeks to condemn. A new day and a new era demands no distinction between sexes. The female populace of this great nation are demanding this idea which is further corroborated by the near adoption of the ERA Amendment to the United States Constitution, and a similar clause which was recently adopted in the new Louisiana Constitution of 1974.

The City Ordinance in question goes even further than its counterpart that is found in R. S. 26:285 and R. S. 26:88. The Ordinance in question prohibits such conduct by "an alcohol beverage handling employee". This makes a most irrational distinction between dancers and watchers on one hand and barmaids and bartenders on the other. For example: A dancer is employed, she serves no drinks, pours no drinks, and does not handle alcoholic beverages at all. She dances, walks up to a customer and asks him to buy her a drink or she accepts a drink offered to her by a customer and let's even assume she receives a special commission on the drink. Is she guilty of criminal conduct under the ordinance? The answer quite obviously is no. Under the Ordinance in question, it is entirely possible for a female employee, seeing a friend on the premises or perhaps even a spouse, to commit a crime merely by sitting down with the friend or spouse and asking for a drink, or for that matter accepting a drink. Under those circumstances, can it be said with sincerity that the public morals and health then and there become jeopardized? Certainly not. In short, the Ordinance is discriminatory because of sex and even discriminates among the employees on the premises. There certainly can be no showing of a rational basis for the existence of such statute under the guise of protecting the public health and morals, and therefore, no legitimate function exists save perhaps the legislating of a new and future set of morals for those who either earn their livelihood in an establishment which legally dispenses alcoholic beverages or those who are lawfully on the premises for the purpose of consuming alcoholic beverages.

This Honorable Court is referred to the case of White v. Fleming, 374 F. Supp. 267, United States District Court for the Eastern District of Wisconsin, 1974. This case involved a female employee of a tavern bringing an action seeking a declaratory judgment that an ordinance which prohibited female employees, but not male employees, from sitting with patrons of the opposite sex as unconstitutional. The United States District Judge Reynolds, held that such an ordi-

nance was in fact unconstitutional. The Honorable Judge in his decision states:

> "What is at issue here is not per se a regulation of the liquor industry but an ordinance which circumscribes the conduct of an individual in a tavern: conduct which would be legal in any other context but is herein made illegal solely because of the sex of the individual. I find that plaintiff has stated a cause of action, and deny the defendants' motion to dismiss . . . . .
>
> Since the ordinance prevents the solicitation of drinks by females and not by males, plaintiff's complaint clearly shows the existence of a classification based on sex. In the absence of a fundamental interest and/or a suspect classification, the question becomes whether the legislative distinction is arbitrary and without rational relationship to a legitimate legislative objective. As the United States Supreme Court stated in Reed v. Reed, 404 U. S. 71, 92 S. Ct. 251, 1971, : '. . . . this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. The Equal Protection Clause of that Amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circum-

stanced shall be treated alike. See cases cited.'

"I must therefore inquire whether defendants have shown that the ordinance in question is rationally related to a legitimate governmental interest. Identifying the city's purpose in passing this ordinance is not an easy task. Here defendants argue that the bargirl ordinance was designated to prohibit women employees from fraternizing with male customers in a tavern because said fraternization leads to several evils; namely, solicitation of drink orders, loitering for the purpose of perpetrating or planning immoral acts, and commission of fraud on the patrons.

"In other words, defendants contend that the prohibition of female employees from sitting at tables with male patrons is designed to achieve the following results: (1) less solicitation of drink orders by female employees; (2) less planning of and, assumably, consummation of immoral acts by female employees; and (3) less perpetration of fraud on the tavern's clientele by female employees. Defendants have presented nothing to support these conclusions. In addition, defendants do not advance any reasons to show why the elimination of solicitation, immorality, and fraud is any more attainable by regulating the service of drinks by women rather than by men." (Emphasis is ours.)

. . . . . "Here, however, I find the ordinance to be so irrational, invidious, and patently arbitrary that I cannot perceive of any possible showing that the ordinance is rationally related to a legitimate government interest. That is, I cannot perceive of any means of showing that

> the elimination of solicitation, immorality, and fraud is more attainable by the regulation of the serving of drinks by women than by men. Based, therefore, on the defendants' failure to show that the ordinance stands in a rational relationship to legitimate government interests, and the ordinance's patent arbitrariness, I must strike it down as being in violation of the Fourteenth Amendment. See cases cited."

The Court is next referred to the case of Daugherty v. Richard J. Daley, Mayor of Chicago, 370 F. Supp. 338, United States District Court Northern District for Illinois, 1974. This was a case brought in United States District Court for Illinois challenging the constitutionality of Illinois' Statutes prohibiting the solicitation by females in taverns of the purchase of alcoholic or non-alcoholic beverages and further prohibiting anyone from serving female employees beverages purchased by male patrons of the tavern. The case was heard by a three (3) judge District Court who determined that the Illinois Ordinances in question were unconstitutional in that they discriminated on the basis of sex and amounted to a denial of equal protection of the law. The Court in making its decision stated:

> "We do not have here the question of the authority of the State to impose reasonable controls upon employee solicitations or the inducement of patrons to buy drinks, or even to ban solicitation entirely. But to prohibit solicitation by female persons and not male persons sets up a classification based on sex which is subject to 'close scrutiny' under the Equal Protection Clause of the Fourteenth Amendment. Reed v. Reed, 404 U. S. 71, 1971. . . .
>
> "The defendants argue that Illinois classification nevertheless is reasonable because it attempts to eliminate commercial exploita-

tion through those well-known sexual inducements inherent in the practice of solicitation by female employees. Clearly, the objective of eliminating undesirable commercial exploitation particularly through sexual inducements practiced in the surrounding of a bar is not without some legitimacy. The question, however, is whether the statutes advance that objective in a manner consistent with the Equal Protection Clause. No reason appears nor is advanced to show why the elimination of commercial exploitation is more attainable by prohibition of solicitation by women employees than by male employees. Absent such a showing we see no reason for discriminating in favor of males and against females in serving the legitimate purpose of the legislature in enacting the sections in suit.

"We find today no rational basis for distinguishing between female and male tavern employees who solicit drinks for themselves or others; nor between the bartender or barmaid who serves solicited drinks to a male employee. There is both sex discrimination and statutory overreaching when a male bartender or waiter may lawfully suggest that a patron purchase a drink for him, the barman or for anyone else, regardless of sex; but when this suggestion is made by a female bartender, waitress or entertainer she has committed a State crime and as a result a business license may be revoked.

"The Sections are overbroad and vague for further reason. If read literally, it would prohibit all females whether employees or patrons from requesting the purchase of alcoholic or non-alcoholic beverages. Even in the most innocent circumstance this section would prevent a woman from asking her male companion to purchase any liquid refreshment for her while they are in a bar. . . ."

Now face to face with this question, and from reviewing the decisions as cited hereinabove, it is obvious, and patent on the face of the record, that the City of Bossier City, presented no evidence whatsoever relating to a rational basis for the Ordinance in question.

As stated hereinabove, the Fourteenth Amendment of the United States Constitution and the Louisiana State Constitution further requires that a statute be clear and not so vague or uncertain as to require one to speculate to its possible application. There is no question but that the Bossier Ordinance is drawn so broadly that it prohibits conduct that is innocent and constitutionally permissable. The Ordinance makes criminal a request by a wife to her husband to buy her a glass of orange juice on the premises if she so happens to be an alcoholic beverage handling employee on the premises. The Ordinance also makes criminal a wife accepting a drink of any kind from her husband if she happens to be a compensated alcoholic handling employee on the premises.

In analyzing this area of the law, it is pertinent to consider the recent opinion of the United States Supreme Court in the case of Erznoznik v. City of Jacksonville, 43 LW 4809. In this case, the manager of a drive-in theater in Jacksonville was charged with a violation of the municipal code prohibiting the exhibiting of a motion picture, visible from public streets, in which female buttocks and bare breasts were shown. The Court therein stated:

"Appellee's primary argument is that it may protect its citizens against unwilling exposure to materials that may be offensive. Jacksonville's ordinance, however, does not protect citizens from all movies that might

offend; rather it singles out films containing nudity, presumable because the lawmakers considered them especially offensive to passerby.

This Court has considered analogous issues - pitting the First Amendment rights of speakers against the privacy rights of those who may be unwilling viewers or auditors - in a variety of contexts." (Citations ommitted.)

"A State or municipality may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech irrespective of content." (Citations ommitted.)

"But when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power." (Citations ommitted.)

"Such selective restrictions have been upheld only when the speaker intrudes on the privacy of the home." (Citations ommitted.)

"The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively employ a majority to silence dissidents simply as a matter of personal predilections." (Citations omitted) . . .

"The plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms

of expression, 'we are inescapably captive audiences for many purposes.' " (Citations ommitted) . . .

"Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, absent the narrow circumstances described above, the burden normally falls upon the viewer to 'avoid further bombardment of [his] sensibilities simply by averting [his] eyes.'"(Citations ommitted) . . .

"The Jacksonville ordinance discriminates among movies solely on the basis of content. Its effect is to deter drive-in theaters from showing movies containing any nudity, however innocent or even educational. This discrimination cannot be justified as a means of preventing significant intrusions on privacy. The ordinance seeks only to keep these films from being seen from public streets and places where the offended viewer readily can avert his eyes. In short, the screen of a drive-in theater is not 'so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it.' " (Citations omitted.)

"Thus, we conclude that the limited privacy interest of persons on the public streets cannot justify this censorship of otherwise protected speech on the basis of its content." (Citations omitted). . .

Thus, by analogy to and in light of the analysis here-

inabove, it seems clear that the Ordinance in question is patently unconstitutional.

The procedures held valid by the lower courts are improper and unconstitutional in several respects. First of all, Section 5-30 (5) provides that before a permit may be suspended, the permittee must have been convicted in a court of competent jurisdiction of a violation of the ordinances. This was simply not done. By no stretch of the imagination is the City Council a court of competent jurisdiction. Apparently the lower courts relied on R.S. 26:79 for the authority for the Council to act. This was not the case. It is clear the petitioner was alleged to have violated Section 5-7 (7) of the Bossier City Code, a municipal ordinance, as opposed to any reliance on the Revised Statutes counterpart. This being the case, 26:79 (8) would be applicable. 26:79 (6) and (7) would not be appropriate as they deal with determination with regard to alleged violations of provisions of the Revised Statutes, i.e. R.S. 26:88. As mentioned earlier, petitioner was alleged to have violated an ordinance contained in the Bossier City Code. R.S. 26:93 provides in essence conviction by a court of violation of the provisions of "this Chapter" is not a condition precedent to revocation. Logically this reference applies to Revised Statutes Sections, i.e. R.S. 26:88 but has no application to alleged violations of municipal ordinances. It states:

> "(8) Has not been convicted of violating any municipal or parish ordinances adopted pursuant to the provisions of this chapter. . ." (Emphasis ours)

Reading this sub-section in respect to all others pertinent herein it is abundantly clear that in dealing with alleged violation of municipal ordinances, a conviction in a court of competent jurisdiction is a condition precedent to a permit suspension. No such convictions exists in relation to the relator. This being the case, suspension is completely improper. The two-step procedure essential in a permit suspension was not followed. The procedures forced relator to defend a "prosecution" for an

alleged violation and also at the same time try to maintain his license by defense of same. Due to the complexity of the issues involved in each of the factual and legal determinations petitioner was denied a fair hearing. This constitutes a substantial violation of his constitutionally protected rights of due process of law, equal protection and the right of self-incrimination.

A provision allowing the City Council to make such a judicial determination would violate the due process provision in the United States Constitution. To hold otherwise is to ignore the composition and responsibilities of the Council. The provisions argued to be valid in this case allow the city attorney to act as judge with regard to alleged violations. The assistant city attorney prosecutes the case and examines the witnesses. The Council acts as jury in determining whether or not suspension is proper.

Although the facts are readily distinguishable, the language of the United States Supreme Court in the case of In Re Murchison, 349 U. S. 133, 75 S. Ct. 623 (1955) is highly pertinent. In that case, the Court stated:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end. . .no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that every procedure which would offer a possible temptation to the average man as judge. . . .not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law. . . Such a stringent rule may sometimes bar trial by judges who have no actual bias and who

> would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' "

Such is the case at bar. The city attorney is the judge on the City Council while his assistant prosecutes the case. Not only does this not "satisfy the appearance of justice" but this definitely admits to the contrary. There is no way the "judge" in such a set-up can separate himself from the prosecutional function incumbent in his position as city attorney. This being the case, petitioner has certainly been denied due process of law in that he has been denied a fair and impartial trial. This is not cured by a trial de novo as the ordinance which is involved in this case is itself unconstitutional. There was thus no conviction in the case and no suspension. To this date, there has been no conviction and the lower court lacked the authority to suspend the said permit.

It must be pointed out that there are inherent inequities in allowing the City Council to make such dual determinations. At the conclusion of the initial hearing before the City Council, the Council argued to delay action on the charges until February of 1975, and petitioner's counsels were so advised that petitioner could continue operating the business establishments in question until a decision was rendered in February of 1975. At approximately 3:15 p.m. on December 30, 1974, the same day, one of petitioner's attorneys was informed by word of mouth that the City Council was going to rule on petitioner's hearing. Petitioner was not present at the time of said ruling and his attorney arrived only in time to hear the mention made for suspension and that by unanimous vote the Honorable City Council ordered the liquor permits suspended. On December 31, 1974, it was revealed in The Shreveport Times, a local newspaper, that the mayor urged the suspension in light of a suit which had been filed against the City by relator. This is completely arbitrary action, yet the ordinance allows this type of

arbitrariness. Such is a violation of one's right to due process of law. Such allowance makes a mockery of the due process provision.

CONCLUSION

The Bossier City Ordinance serves as a deprivation of petitioner's Constitutionally protected rights.

The statute involved is so overbroad as written that it strikes at the heart of the 14th Amendment equal protection clause. Basically innocent conduct is not a basis for invidious, unreasonable discrimination in the name of state regulatory power.

Petitioner stands at the end of the judicial system. John G. DeFrancis, Jr.'s Constitutional rights under the 14th Amendment have been infringed upon throughout the Louisiana Judicial System. There must be a compelling state interest to justify discrimination based on sex. Petitioner humbly submits that "B-drinking" by consenting adults simply is not a compelling state interest sufficient to deny due process and equal protection of the law.

This Honorable Supreme Court sits as the guardian of our great Constitution. To allow discrimination based on sex with no compelling state interest would be to endanger our Constitutional Rights under the guise of regulating innocent conduct. Accordingly, writs should be granted by this Honorable Supreme Court and eventually there be judgment reversing the judgment of the Louisiana Court of Appeals for the Second Circuit, as affirmed by the Louisiana Supreme Court, declaring the Bossier City Ordinance unconstitutional.

Respectfully Submitted,

KELLY AND WARE
P. O. BOX 756
NATCHITOCHES, LOUISIANA 71457

GOFF, GOFF & LEVY
P. O. BOX 308
RUSTON, LOUISIANA 71270

BY: Donald G. Kelly
DONALD G. KELLY

STATE OF LOUISIANA
PARISH OF NATCHITOCHES

BEFORE ME, the undersigned authority, personally came and appeared, Donald G. Kelly, who after first being duly sworn did depose that:

A copy of the above and foregoing Petition for Writ of Certiorari to the Supreme Court of the United States, has this day been mailed to the City of Bossier City, through its attorneys, Mr. Stephen G. McKenzie and Mr. Roland McKneely, 614 Barksdale Boulevard, Bossier City, Louisiana, 71010, postage prepaid, on this the 26 day of April, 1976.

Donald G. Kelly

Sworn to and subscribed before me this 26 day of April, 1976.

Notary Public

NO. 12,727

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

JOHN G. DeFRANCIS, JR. Plaintiff-Appellant

v.

THE CITY OF BOSSIER CITY Defendant-Appellee

Appeal from the Twenty-sixth Judicial District Court
Parish of Bossier, State of Louisiana

Hon. Monty M. Wyche, Judge

Kelly, Seaman & Ware
by Donald G. Kelly
Goff, Goff & Levy
by A. K. Goff, III

Attorneys for Plaintiff-Appellant

Steven G. McKenzie

Attorney for Defendant-Appellee

Before PRICE, HALL and BURGESS, JJ.

By BURGESS, J.

John G. DeFrancis, Jr., appeals from a judgment of the district court affirming a decision of the City Council of Bossier City, Louisiana, which had ordered petitioner's retail liquor permits suspended for alleged violations of the Bossier City "B drinking" ordinance.

The violations for which DeFrancis was charged occurred November 2, 1974, and petitioner was notified that a hearing would be held by the City Council of Bossier City on Monday, December 30, 1974, regarding the possible suspension or revocation of petitioner's liquor permits.

Causes for suspension were set forth in separate letters dated December 17, 1974, and mailed to plaintiff. Regarding permit number 2696 issued to DeFrancis d/b/a Fountain Lounge, the causes for revocation or suspension are stated as follows:

> "a. Violation of the provisions of Section 5-7(7) of the Code of Ordinances of Bossier City, Louisiana by employing or permitting females to engage in 'B Drinking', to-wit: Joan West on November 2, 1974.
>
> "b. Violation of the provisions of Section 5-31(7) of the Code of Ordinances of Bossier City, Louisiana in violating the above mentioned section."

The letter dealing with revocation of permit number 2697 issued to DeFrancis d/b/a Black Knight Lounge, states the causes for revocation or suspension as follows:

> "a. Violation of the provisions of Section 5-7(7) of the Code of Ordinances of Bossier City, Louisiana by employing or permitting females to engage in 'B Drinking', to-wit: Nina Oden on November 2, 1974.

"b. Violation of the provisions of Section 5-31(7) of the Code of Ordinances of Bossier City, Louisiana in violating the above mentioned section."

The hearing was had on the specified date and the council ordered that 1974 city liquor permits numbered 2697 and 2696 held by DeFrancis d/b/a Black Knight Lounge, Incorporated, and d/b/a Fountain Lounge, Incorporated, be suspended for a period of 15 days effective the first day of January, 1975, for one violation and for a period of 15 days effective the 16th day of January, 1975, for the other violation.

In accordance with the procedure provided by Louisiana Revised Statutes 26:104, plaintiff filed in the district court a petition for devolutive appeal, alleging that improper notice was given him of the hearing because the wrong sections of the city ordinance were set forth in the attached letters; that the action of the City Council was incorrect and illegal and based upon the Bossier City ordinances which are unconstitutional. Plaintiff also asked for and was granted a stay order pending the appeal.

The matter was tried de novo in the district court at which time testimony was given by police officers concerning the alleged "B Drinking" violations occurring at both the Black Knight Lounge and the Fountain Lounge, for which plaintiff had 1974 liquor permits. Plaintiff introduced no rebuttal to this testimony.

In written reasons for judgment the district judge recited what was designated as Section 5-7(7) of the Code of Ordinances of Bossier City, Louisiana:

"No person holding a retail dealer's permit under this chapter and no alcoholic beverage handling employee shall do or permit to be done any of the following acts on or about the premises covered by such permit:

* * *

"(7) Employ or permit females, commonly known as B-Girls, to frequent the premises and solicit patrons for drinks or to accept drinks from patrons and receive therefor any commission or any remuneration in any other way."

The district judge held that the ordinance under consideration was not unconstitutional but was a valid exercise of police power, citing Burnette v. Louisiana Board of Alcoholic Beverage Control, 252 So. 2d 346 and Nichols v. Louisiana Board of Alcoholic Beverage Control, 257 So. 2d 484.

He further found the evidence adduced at the trial de novo "conclusively establishes that employees of the petitioner, namely Joan West and Nina Oden, did solicit drinks in violation of the above quoted ordinance,", and that petitioner's actual knowledge of the proscribed acts was not required, again citing Burnette, supra. He ordered the decision of the City Council of Bossier City relative to the suspensions be affirmed, said suspensions to begin effective ten days from the signing of the judgment, which was signed February 11, 1975. Petitioner perfected his appeal from this judgment on February 14, 1975, and obtained an order from the Louisiana Supreme Court staying execution of the suspension pending the finality of the appeal to this court.

On appeal plaintiff assigns the following errors:

1. The trial court erred and abused its discretion in affirming the suspension of a 1974 retail liquor permit in the calendar year of 1975, which in fact presented a moot issue.

2. The judgment of the district court is erroneous in that it upholds the constitutionality of the ordinance of the City of Bossier City prohibiting and criminalizing innocent activities, i.e., a female employee of a retail liquor licensee soliciting from a patron a "drink" for herself.

Plaintiff contends it is evident from the record the orders of suspension deal with two 1974 liquor permits which by statute expired December 31, 1974. He argues that as a

consequence the court is without authority to suspend the 1974 permits during 1975 for a violation occurring in 1974, and that the appeal presents a moot question.

With regard to the issue of the correctness of the action suspending the permit, the trial judge has, in his reasons for judgment, made reference to Louisiana Revised Statutes 26:88, which sets forth numerous acts prohibited on premises licensed to sell beverages of high alcoholic content and the penalty for violations, as follows:

> "No person holding a retail dealer's permit and no agent, associate, employee, representative, or servant of any such person shall do or permit any of the following acts to be done on or about the licensed premises:
>
> * * *
>
> "(8) Employ or permit females, commonly known as B-Girls to solicit patrons for drinks.
>
> . . . .
>
> * * *
>
> "Violation of this Section by a retail dealer's agent, associate, employee, representative or servant shall be considered the retail dealer's act for purposes of suspension or revocation of a permit.
>
> "Violation of this Section is punishable as provided in R.S. 26:191 and is also sufficient cause for the suspension or revocation of a permit.
>
> "Notwithstanding the issuance of a permit by way of renewal, the commissioner of alcoholic beverage control may revoke or suspend such permit, as prescribed by this Chapter, for violations of this Section occurring during the permit period immediately preceding the issuance of such permit." (Emphasis added)

Under the provisions of La. R.S. 33:4785, any municipality may suspend or revoke within the corporate limits permits issued to retail dealers in beverages having an alcoholic content of more than six per cent by volume for causes set forth in R.S. 26:88 and 26:89.

Since the determination by the trial court that plaintiff violated the provisions of the ordinance is uncontested, we will consider first whether the appeal in fact presents a moot issue. This issue is in reality two-fold: Can the municipal authorities enforce the suspension of a liquor permit in 1975 for violations occurring while the licensee was operating the business under a 1974 permit; if not, does there exist a valid reason for passing on the legality of the suspensions?

The last paragraph of La. R.S. 26:88, quoted supra, permits enforcement of the suspension for violations of that section occurring during the permit period immediately preceding the issuance of such (renewal) permit, and R.S. 33:4785 authorizes the governing authority of a municipality to suspend or revoke within the corporate limits liquor permits issued by it for "causes set forth in R.S. 26:88." Thus, it appears that the suspensions, if affirmed, may be enforced against DeFrancis as to any liquor licenses under which he may be operating in Bossier City in 1975.

If these suspensions are unenforceable for the reason plaintiff has no current liquor permit or permits in Bossier City, we think it is nevertheless proper for us to determine the validity of the suspensions since such a determination could affect the issuance or denial of a permit to DeFrancis in subsequent years. Louisiana R.S. 26:79 sets forth the qualifications of applicants for permits and requires that applicants for state and local permits of all kinds shall meet the following qualifications and conditions:

> * * *
>
> "(6) Has not had a license or permit to sell or deal in alcoholic beverages issued by the United States, any state, or by any political

> subdivision of a state authorized to issue permits or licenses, revoked within one year prior to the application. . . . .
>
> "(7) Has not been adjudged by the board or convicted by a court of violating any of the provisions of this Chapter."

Since adjudication that a licensee is guilty of violating any provision of R.S. 26:88 (i.e., B-Girls) is ground for suspension or revocation, the affirmance of the suspensions could have a direct effect on DeFrancis' ability to obtain a renewal permit.

In Allen v. Louisiana Board of Alcoholic Beverage Control, 141 So. 2d 680 (La. App. 1st Cir. 1962), the court, after an exhaustive review of the question, held:

> "In the case at bar, while the notice for the hearing only mentioned the 1961 licenses and permits, LSA-R.S. 26:79(A) (6) and (7) specifically state that no permit may be granted to a person who has had a permit revoked within one year prior to the application and that no permit may be granted to a person who has been adjudged by the Board to have violated any of the provisions of Chapter 1 of Title 26. Under the statutory provisions, the revocation of plaintiff-appellee's 1961 license is not a moot question." (Emphasis added)

See also Brumfield v. Louisiana Board of Alcoholic Beverage Control, 265 So. 2d 302 (La. App. 4th Cir. 1972), in which the court held, following the Allen decision, that the appeal from a reversal of a revocation of a liquor permit was not rendered moot by expiration of the permit where correctness of the revocation would have a bearing on subsequent permits.

We consider next the question of the constitutionality of the "B-drinking" ordinance and statute. Appellant does not deny the right of the State of Louisiana or a municipal subdivision thereof to regulate various business activities under its

police power. However, he urges that such regulation must be tempered with reason and that the statute and ordinance relative to "B-Girls" denies equal protection to the female sex and discriminates against females, since neither the ordinance nor the statute applies to males who might be employed on the premises. DeFrancis argues that any classification on the basis of sex is inherently suspect and must be subjected to strict judicial scrutiny. Under this analysis, the state must show a compelling state interest in differentiating between the sexes. He cites as authority for this contention the case of Frontiero v. Richardson, 411 U.S. 677, 36 L. Ed. 2d 583, 93 S. Ct. 1764 (1973), and the following language in particular:

> "With these considerations in mind, we can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny. Applying the analysis mandated by that stricter standard of review, it is clear that the statutory scheme now before us is constitutionally invalid."

We note Frontiero is not conclusive authority for appellant's contention that sex is a suspect classification subject to strict judicial scrutiny, as a majority of the court did not subscribe to that statement of law quoted above.

It has long been recognized that the state, and its subdivisions, acting under legislative grants of authority and in the exercise of its inherent police power, may regulate the sale of intoxicating liquors. Although intoxicating liquors and traffic therein, where permitted or tolerated, are as lawful as any other property or business and as fully entitled to protection, yet the liquor traffic is admittedly dangerous to public health, safety, and morals and is therefore essentially within, and its regulation or prohibition is fully justified under, the police power. See 45 Am. Jur. 2d, Intoxicating Liquors, Section 23 and cases cited thereunder.

In Burnette, supra, a licensee's liquor permit was suspended for seven days and he appealed attacking the constitutionality of La. R.S. 26:88 (8), formerly (7), on the grounds that the statute was discriminatory as to the appellant and alleged "B-girls" as compared with other entertainers. The court, without further discussion, held the statute "on its face is not discriminatory, and appellant has offered no evidence that it has been so applied", and, therefore, found appellant had not been denied equal protection of the law.

We find the ordinance in question does not have the effect of forcing DeFrancis to discriminate between hiring females as employees to perform any of the jobs ordinarily performed by males in the operation of his business. The ordinance merely operates to regulate certain activities of all persons holding liquor licenses in Bossier City by prohibiting licensees from permitting females to "solicit" from patrons the purchasing of drinks. By the provisions of R.S. 26:88 (8), this prohibition applies to all persons licensed by the state to dispense alcoholic beverages of high alcoholic content.

In a recent decision the Louisiana Supreme Court, in State of Louisiana v. Devall, 302 So. 2d 909 (La. 1974), upheld the state's prostitution statute which defined the crime as "the practice by a female of indiscriminate sexual intercourse with males for compensation." A woman charged with prostitution had attacked the statute as being unconstitutional since it denied her the equal protection of the laws. The Supreme Court in discussing the "equal protection" concept stated:

> ". . . the guarantee of equal protection of the laws means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons in like circumstances.
>
> * * *
>
> ". . . However, in matters in which sex is a material factor, a statute may make a distinction without violating the constitutional guarantee, if the classification is a natural and reasonable one."

The court then considered Devall's argument that the prostitution statute denied her the equal protection of the laws and stated:

> "With this bare record the court is called upon to presume that the purpose of the legislature in enacting the controverted statute was for some legitimate state purpose, and that the method chosen was relevant to the achievement of that purpose. However, given this presumption, the contention is that the classification in the Act is irrational, for the objects and purposes of the legislation could have been achieved just as well by making it a crime for men to engage in indiscriminate sexual intercourse for compensation. To make such conduct criminal when engaged in by women only, defendant argues, is the type legislative choice forbidden by the Equal Protection Clause.
>
> "To sustain this contention we must assume that the classification implicit in the statute is unreasonable. But this we may not do. The burden is upon the person claiming that the classification is unreasonable and irrational to support that contention with facts which will overcome the presumption of constitutionality.
>
> "Only argument is advanced to support defendant's contention. It is argued that male prostitution is prevalent and constitutes a social evil detrimental to the public welfare just as does female prostitution. Aside from the fact that this record does not support the facts upon which this contention rests, there

> is nothing upon which this Court can rely to conclude that male prostitution is a social problem of any importance. A court may not suppose that male prostitution is a problem of such significance that the legislature should proscribe the practice as a crime. The Constitution does not and should not require the legislature, before attempting to regulate an existing practice which is detrimental to the public welfare, to regulate a practice which is not."

The Supreme Court's reasoning is applicable to the case before us. Statutes are presumed to be constitutional. The legislature may make classifications based upon sex where the classification is rationally related to the achievement of a legitimate state purpose. The burden of proving that the legislature's classification is irrational and arbitrary rests squarely on the party challenging the constitutionality of the statute. Other than allegations made in brief, appellant has not shown that solicitation of drinks by males constitutes a social evil of any significance. Therefore, the classification along sex lines in this case is not irrational or arbitrary. "The Constitution does not and should not require the legislature, before attempting to regulate an existing practice which is detrimental to the public welfare, to regulate a practice which is not." Devall, supra.

From our study of the circumstances in the instant case and the application of the ordinance to activities of the plaintiff licensee, we find he has not been discriminated against by the actions of the council in enforcing the city ordinance or the state statute. We further find, in view of the Louisiana Supreme Court decision in Devall, that the ordinance and statute here in question are not violative of any provisions of the Constitution of the United States or of the State of Louisiana.

Accordingly, the judgment of the lower court is affirmed and it is ordered that the two city retail liquor permits for the year 1974, in the name of John G. DeFrancis, Jr., listed

as Permit No. 2696, Fountain Lounge, Inc., and Permit No. 2697, Black Knight Lounge, Inc., and any operating privileges under any existing permits which he may hold in the City of Bossier City be suspended for a period of 30 days, such suspension to become effective within ten days from the date this judgment becomes final.

All costs of these proceedings, including the costs of appeal, are assessed against appellant.

SUPREME COURT OF LOUISIANA

NEW ORLEANS, 70112

JOHN G. DeFRANCIS, JR. January 30, 1976

V.

THE CITY OF BOSSIER CITY NO. 57,358

G.

In re: John/DeFrancis, applying for Certiorari, or writ of review, to the Court of Appeal, Second Circuit, Parish of Bossier.

Writ denied. On the facts found by the Court of Appeal, there is no error of law in the judgment complained of.

/s/ FWS

/s/ JWS

/s/ AT Jr.

/s/ JAD

/s/ WFM

/s/ JLD

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans
January 30, 1976

/s/ Phil Trice

Deputy Clerk